Public Knowledge

July 11, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: GN Docket No. 13-5, In the Matter of Technology Transitions

Dear Ms. Dortch:

On July 8, 2016, Harold Feld and Dallas Harris of Public Knowledge ("PK) and Debbie Goldman of Communications Workers of America ("CWA") (collectively referred to as "advocates") met with Stephanie Weiner, Special Advisor to Chairman Wheeler, Matt DelNero, Chief, Wireline Competition Bureau, Daniel Kahn, Carol Mattey, and Peter Saharko, with regard to the above captioned proceeding.

Advocates expressed support for Commission action to facilitate the transition to advanced network infrastructure by clarifying the process and criteria that the Commission will use to evaluate a 214(a) streamlined discontinuance request from a legacy voice TDM provider. In general, advocates' indicated that the proposed order's "adequate replacement" criteria are consistent with the Commission's commitment to preserve and advance the enduring values of consumer protection, universal service, public safety, and competition as the bedrock of our nation's communications policy while providing the clarity that carriers need to move forward with the upgrading of their network infrastructure.

However, advocates expressed concern over several aspects of the proposed order in the above captioned proceeding ("Tech Transitions"). First, the Commission should require carriers to certify there is a broadband provider in the service area prior to discontinuing service. Second, the Commission should ensure that there is an adequate public comment period for a 214(a) discontinuance, and suggested 60 days for comment and 30 days for reply comments. Third, the Commission should include affordability of the "adequate replacement" as part of the application when a legacy TDM voice carrier applies for streamlined treatment. Fourth, where the carrier terminating TDM service is the only Lifeline provider in the service area, the Commission should require that an exiting provider first find an alternative Lifeline provider to ensure affordable service. Finally, Advocates expressed concern that the Commission require carriers to make educational and outreach materials available in languages other than English.

1. The Commission Must Allow more Time For Public Comment For A Requested TDM Discontinuance.

In the infant stages of the new discontinuance process, the Commission should refrain from placing any applications through the accelerated approval process. As proposed, he public would have a short fifteen days to comment on whether an "adequate replacement" is available. In

the beginning, given that the application process will be new to the public, staff and carriers, fifteen days is an insufficient amount of time for the public to adequately weigh in. Therefore, the Commission should wait until the public and staff is familiar with the process before considering applications for streamlined approval of discontinuance petitions.

Alternatively, if the Commission decides to permit streamlined application process from the beginning, the Commission should allow sufficient time for customers and other stakeholders to file sufficient information to demonstrate that the Commission should take the discontinuance request off streamlined treatment and designate it for standard consideration. Thus, advocates suggest that there be a 60 -day comment period and 30-day reply comment period for the public to weigh in on a carrier's application for automatic approval. Advocates recommend the 90-day comment and reply time frame in light of the 90-day notice period for copper loop retirement adopted in the previous Report and Order. Advocates argue that the importance of TDM service termination is no less important to the local community than the retirement of the copper loop. This time frame balances the need to provide time for members of the community to gather information and provide adequate evidence for consideration with the need to avoid undue delay.

2. Maintaining Access to Broadband.

In addition, the proposed streamlined adequate replacement criteria do not allow Commission staff to consider whether a service discontinuance would result in households losing access to broadband. The Commission has a congressional mandate to encourage broadband deployment, and as a policy matter, should ensure that any actions it takes donot reduce broadband availability.[1] As demonstrated by the experience on Fire Island in 2013, copper loop retirement and termination of TDM service are likely to result in the loss of home broadband access. Given the express federal policy to affirmatively promote home broadband access,[2] this result is untenable and contrary to public policy.

The inclusion of broadband availability in a discontinuance review does not contradict the Commission's decision in the Open Internet Order to forbear from application of Section 214(a) to broadband. Rather, this flows from the question the Commission solicited regarding the combined impact of the retirement of the copper loop line and the termination of TDM service. The Commission's determination that the obligation under Section 214(a) to ensure that local communities have the benefit of competition based on copper loop access applies with even greater force to the elimination of broadband access, such as copper loop dependent broadband. The Commission's express solicitation of comment on broadband discontinuance with reference to Fire Island (*see* 2015 FNPRM at ¶229-230 & n.705, n. 707), is a logical indication that the Commission would consider the combined impact of copper loop retirement in conjunction with TDM service discontinuance in this instant proceeding. As a matter of law and public policy, the Commission must ensure that a 214(a) discontinuance does not leave some households, businesses, and communities with no broadband access.

[1] 47 U.S.C. §1302.

[2] *See, e.g.,* Broadband Data Improvement Act of 2008, Pub. L. 110-385.

A review of the *2015 Order & FNPRM*[3] demonstrates that the Commission intended to consider the loss of the sole wireline broadband provider as a result of copper loop retirement combined with a TDM discontinuance – or that such a consideration was a reasonable foreseeable logical outgrowth of the Commission's *FNPRM*.

First, it is important to understand that the Commission in the *Report and Order* described the relationship between the copper loop notification 251(c)(5) and discontinuance under Section 214(a). The Commission began by observing that "changes in network facilities can result in a discontinuance, reduction or impairment of service."[4] Citing explicitly to Fire Island, the Commission cautioned all carriers "to consider carefully whether proposed copper loop retirement will be accompanied by, ***or be the cause of*** a discontinuance, reduction, or impairment of service provided over copper for which they must file a discontinuance application."[5] In further discussing the difference between a copper loop notification and a discontinuance, the Commission rejected the request of the Rural Policy Group that carriers obtain affirmative consent when replacing a copper loop because "any loss of service as a result of a copper retirement may constitute a discontinuance, reduction, or impairment of service for which a Section 214(a) application is necessary."[6] Similarly, the Commission rejected the request of CWA for notice requirements that would result in loss of broadband services as a function of copper loop retirement because these concerns were "more appropriately addressed in the context of a section 214(a) discontinuance."[7]

By the time the Commission issued the *2015 Order &FNPRM*, the Commission had already decided to forbear from application of Section 214(a) to broadband Internet access service (BIAS). Nevertheless, the Commission routinely throughout the Order refers to the importance of notifying customers of the impact of the loss of copper lines and concern that consumers would lose access to broadband services.[8] Clearly, then, the Commission could not be referring to the filing of a 214(a) for the discontinuance of the broadband service. To what 214(a) discontinuance could the Commission therefore be referring when it reassured both the Rural Broadband Group and CWA that the loss of broadband as a result of copper loop retirement – in the manner similar to what occurred on Fire Island – was more appropriately dealt with in the context of a 214(a) discontinuance accompanying a copper loop retirement? The only logical explanation, in light of the fact that a carrier no longer needs to file a 214(a) discontinuance for broadband, is that the Commission would consider the impact of the copper loop retirement in conjunction with the TDM service discontinuance on which it sought comment in the *FNPRM*.

This conclusion is buttressed by several other factors. First, the Commission made no mention of the forbearance granted broadband providers two months previous. Why would the

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[3] Technology Transitions, GN Docket No. 13-5; Policies Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers, RM-11358, *Report & Order, Order on Reconsideration and Further Notice of Proposed Rulemaking* (Rel. August 7, 2015).

[4] *Id.* ¶ 14.

[5] *Id.* (emphasis added).

[6] *Id.* ¶18 & n.66.

[7] *Id.* ¶ 66.

[8] *See Id.* ¶¶39-40, 43, 51.

Commission fail to even seek comment on the impact of its forbearance order when offering explicit reassurances to the Rural Broadband Group and CWA? Additionally, the Commission noted that it has authority subject to set rules governing copper loop retirement under Section 201(b) "to ensure that incumbent LEC's practices are just and reasonable."[9] The Commission explicitly did not forbear from application of Section 201(b), which forms the basis for its copper loop retirement rulemaking authority.

Additionally, as the Commission explained, the *FNPRM* was not intended to be wholly independent from the copper loop retirement proceeding. Rather, the Commission made clear that it sought ***additional*** information on certain questions raised in the 2014 *Notice* because the Commission "believe[d] that the specific proposals that we raise here will facilitate development of a sufficient record to allow us to fully establish highly effective, clear and technology neutral criteria."[10] In other words, the decision on copper loop retirement in the Order was not the end of the matter. The Commission wanted further evidence in the record for its "specific proposals" on matters such as the loss of potential broadband service. Indeed, the Commission explicitly cited the comments of United Telecom Council on the need to address the potential loss of data services in this context.[11]

Again, if the Commission considered the forbearance granted in the *Open Internet Order* a bar to consideration of he loss of broadband service when considering a combined copper loop retirement notice and 214(a) TDM discontinuance, why not say so? Instead, the Commission sought comment consistent with the impression that it would consider the impact of a copper loop retirement on broadband accessibility in the context of a combined copper loop retirement notice and TDM 214(a) discontinuance. In Paragraph 209, the Commission explicitly asked how to define next generation technologies and how to measure them. Likewise, Paragraph 230 explicitly sought comment on the potential loss of broadband services, explicitly citing to the experience of Fire Island, which combined both a copper loop retirement ***and*** a 214(a) TDM discontinuance.[12]

Taken together, the as ¶ 202 explicitly indicates that the Commission intended, the copper loop retirement process and the 214(a) TDM discontinuance were not considered as entirely independent of one another. The Commission made clear that it intended to consider the impact of the combined copper loop retirement and TDM discontinuance where the two combined to impair or degrade service to the local community. In light of the strong public policy in favor of broadband penetration and adoption, the Commission should make clear that it will consider loss of comparable broadband service as a result of copper loop retirement and TDM discontinuance as an impairment.

It should be noted that loss of wireline broadband is likely to occur only where a carrier is also retiring a copper loop and does not provide a fiber line to replace it ("wireline to wireless transition"). If a carrier discontinues TDM service but maintains the copper to provide VOIP, it is reasonable to assume that the carrier will not discontinue existing IP based services, such as DSL,

[9] *Id.* ¶75 & n.288.
[10] *Id.* ¶202.
[11] *Id.* n.647.
[12] ¶230 & n.707.

when discontinuing non-IP services such as TDM. Similarly, where a carrier provides a fiber line and discontinues TDM service, there is no concern that the carrier will waste the additional capacity of fiber and refuse to offer broadband. It is only in the case of a wireline to wireless transition, *i.e.* one that requires ***both*** a copper loop retirement notice ***and*** a 214(a) discontinuance, that the concern arises. Accordingly, it made sense for the Commission to consider this particular scenario on the basis of the broader record it obtained as part of the further notice of proposed rulemaking, rather than as part of the fully developed copper loop retirement Order.

3. Affordability.

Advocates also expressed concern over the criteria staff will use to evaluate in the streamline application process with regard to affordability. Although affordability is one of the criteria staff will use to evaluate a discontinuance petition that is not eligible for streamlined treatment, it is our understanding that affordability will not be part of the "adequate substitute" determination. As proposed, carriers can apply for streamlined treatment by making an adequate substitute showing. Once staff has determined that the carrier has met this burden, the discontinuance petition is then on track for an automatic approval. If the process is implemented as described, Commission staff is under no obligation to ensure that the proposed "adequate substitute" is comparable in pricing to the discontinued service. This could result in a significant price increase for many Americans. Advocates are certainly in favor of the tech transition because of the promise that it offers for new, advanced communications services, but Americans should be better off as a result of the transition, not worse off.

4. Lifeline

Currently, there is no requirement that the Commission consider whether a service discontinuance would result in the loss of access to the Lifeline voice program. If the legacy carrier applying for a service discontinuance under the streamlined process is a Lifeline provider and the Commission grants the service discontinuance without first ensuring that the "adequate replacement" carrier participates in the Lifeline program,. the result would be that low-income households would lose the only access to Lifeline available in their area. While advocates understand that there are rules surrounding relinquishing an Eligible Telecommunications Carrier (ETC) lifeline designation when there are multiple ETC lifeline providers in a service area, it is not clear that existing rules cover a situation in which the carrier seeking to discontinue a legacy service is the only ETC lifeline provider. Therefore, the Commission must be clear that granting a service discontinuance will not affect any carrier's obligations to provide Lifeline services, nor will it leave a service area with no lifeline provider at all.[13]

5. Outreach

[13] 47 C.F.R. §54.205

Last March, the Commission recognized the vital importance of ensuring access to information on the Emergency alert system (EAS) to non-English speakers.[14] No one can doubt that information about the phone system, which provides access to 9-1-1 and other essential services in addition to its importance in personal communications, is equally critical. The Commission should therefore require that as part of the community outreach plan, applicants for a 214(a) TDM discontinuance must provide information in languages other than English that are spoken in the community of service.

As a basic litmus test, the FCC should look to whether the licensee advertises its services in a language other than English. That a provider makes promotional material available in a non-English languages demonstrates (a) that there is a sufficiently large number of primary speakers in that language to warrant the expense of preparing non-English marketing materials; and, (b) the carrier has the capacity to perform the translation.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
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[14] Review of the Emergency Alert System, *Order,* EB Docket No. 04-286 (Rel. March 30, 2016).